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In the
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE MINNESOTA STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Minnesota State Bar Association (MSBA) is a non-profit corporation of attorneys licensed to practice law in the State of Minnesota. For its mission, the MSBA seeks to

> aid the courts in the administration of justice; apply the knowledge and experience of the profession to the public good; maintain in the profession high standards of learning, competence, ethics, and public service; . . . provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and to publish information relating thereto . . . , [a]ll . . . to more effectively discharge the public responsibility of the legal profession.

Restated MSBA Articles and Bylaws (July 1992).

Precisely this mission brings the MSBA to this Court.[1] The MSBA believes that the "Announce clause" of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, as construed by the Eighth Circuit Court of Appeals

- serves the compelling state interests of Minnesota in preserving both the impartiality and the appearance of impartiality of its non-partisan judiciary

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 37.3. Pursuant to Rule 37.6, the MSBA certifies that no one other than the MSBA and its counsel authored this brief in whole or in part or contributed monetarily to its preparation or submission.

- by a means reasonably necessary and narrowly tailored to achieve Minnesota's interests fully, practically, and effectively.

This Court's affirmation of the Announce clause, as construed by the Eighth Circuit, is of particular interest and importance to the MSBA for three reasons. First, the MSBA represents the vast majority of attorneys who actively practice law in Minnesota; thus, its members—and their clients—depend daily on a state judiciary whose impartiality and appearance of impartiality the Announce clause strives to protect. In addition, the MSBA's membership includes most of the successful and unsuccessful candidates for judicial office—including Petitioner Gregory F. Wersal during some of his judicial campaigns; thus, MSBA-member judges and judicial candidates also benefit from the impartiality and appearance of impartiality afforded by the Announce clause. Finally, the MSBA played a prominent role in studying Minnesota's judicial election process after the 1996 elections; thus, it holds a unique perspective on the history, interpretation, application, and continued desirability of the Announce clause.

STATEMENT OF THE CASE

Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct provides that,

> [a] candidate for a judicial office, including an incumbent judge, shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; *announce his or her views on disputed legal or political issues*; or misrepresent his or her identity,

> qualifications, or present position or other fact, or those of the opponent.

52 Minn. Stat., Code of Jud. Conduct, Canon 5(A)(3)(d)(i) (italics added and hereinafter called "the Announce clause").

Against First Amendment challenge by Petitioners, the Eighth Circuit Court of Appeals construed the Announce clause to preclude candidates only "from publicly making known how they would decide issues likely to come before them as judges." *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 881-82 (8th Cir. 2001). So construed, the Eighth Circuit held that the Announce clause is a narrowly tailored limitation on campaign speech that serves a compelling state interest in maintaining "an independent and impartial judiciary" and an "equally important interest in preserving public confidence in that independence and impartiality." *Kelly*, 247 F.3d at 867, 877-82.

The Minnesota Supreme Court recently affirmed the Eighth Circuit's construction of the Announce clause. Further, it ordered the Board on Judicial Standards ("BOJS") and the Lawyers Board of Professional Responsibility ("LBPR"), which have primary responsibility for applying Canon 5, to enforce the Announce clause "in accordance with the interpretation of that clause by the United States Court of Appeals for the Eighth Circuit." *See* Order, *In re the Code of Judicial Conduct*, No. C4-85-697 (Minn. S. Ct. Jan. 29, 2002).[2]

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[2] This Order should put to rest Petitioners' claim that the Eighth Circuit misconstrued the Announce clause under Minnesota law and their fear that the BOJS and the LBPR might not enforce the Announce clause as the Eighth Circuit construed it. *See* RPM Brief at 28-29.

SUMMARY OF ARGUMENT

Preserving both the impartiality and the appearance of impartiality of state court judges is an "undeniably compelling" governmental interest of "the highest order". So held the Eighth Circuit. *See Kelly*, 247 F.3d at 864, 876. So agreed the dissent. *Id.* at 902-03. (Beam, J., dissenting) ("The Minnesota Supreme Court has every right to . . . protect its judiciary against both actual and the appearance of partiality.") Even Petitioners now agree. *See* RPM Brief at 2 ("There is no doubt that the State has a compelling interest in assuring judicial impartiality. . . . In addition, it is legitimate for the State to regulate judicial campaign conduct and speech in various ways to ensure that they are conducted in a way that will not undermine the public perception of judicial impartiality.").

The question before this Court, therefore, is not whether Minnesota can constitutionally limit judicial campaign speech. It can—because of its compelling state interests in both the actual and the apparent impartiality of a non-partisan judiciary. The only question is whether the Announce clause goes too far in limiting judicial campaign speech—either (1) because it does not advance or (2) because it is not narrowly tailored to achieve Minnesota's compelling state interests. The Announce clause does not go too far.

1. The Announce clause advances compelling Minnesota interests in the impartiality and the appearance of impartiality of a non-partisan state judiciary.

a. However a judge chooses to rule on a "disputed legal or political" issue on which he expressed his "general

legal views" during the campaign,[3] his ruling will raise the specter of partiality. If the judge chooses to rule consistently with his campaign-expressed views, it may reasonably appear to disenchanted litigants as well as to the general public that he ruled partially—even if he did not. On the other hand, if he chooses to rule inconsistently with his campaign-expressed views, then disenchanted voters may next elect a challenger who will rule consistently with his campaign-stated views. Either way, the appearance of impartiality is compromised.

That judges take oaths does not change this fact. Even if campaign-expressed views do not subtract from a judge's impartiality, they subtract from his appearance of impartiality; indeed, in this day and age of political cynicism, they multiply the appearance of partiality. Moreover, Petitioners cannot have it both ways. They cannot demand to know during the campaign how a candidate will exercise his discretion in order to make him "accountable" to the public, yet personally believe—or expect the public to believe—that the candidate, as judge, only followed his oath when he exercised his discretion exactly as he stated he would.

b. In addition to preserving impartiality and the appearance of impartiality, the Announce clause is critical to

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[3] Petitioners use various permutations of the phrase "general views on disputed legal or political issues" to define what they regard as protected judicial speech. *E.g.*, Wersal Brief at 17 ("general views on disputed legal or political issues"); RPM Brief at 4 ("general views on the law"). However, Petitioners' use of that phrase should not be confused with similar language appearing in the Announce clause. When the Announce clause refers to such views, it means only those "issues likely to come before the court." Thus, when the MSBA argues against permitting "general views on disputed legal or political issues," as Petitioners use that phrase, it is not simultaneously criticizing similar language in the Announce clause whose meaning is much different and narrower under the Eighth Circuit's construction of the clause.

protecting Minnesota's compelling interest in non-partisan judicial elections. Partisan overtones would become much stronger, if not prevalent, in judicial elections but for the Announce clause. By Petitioner Wersal's own admission, political party endorsements would become much more frequent if a judicial candidate could declare his "general views on disputed legal and political issues." *See* Wersal Brief at 8, 9 (claiming that the Republican party would have endorsed his candidacy but for the fact that it did not know his "general views on disputed political or legal issues"). In addition, the canon that bars candidates from seeking political endorsement would become practically meaningless without the Announce clause; the candidate need only declare his "general views on disputed legal or political issues" and let the party machinery do the rest. Similarly, the canon barring candidates from attending and speaking at party conventions and political gatherings would be gutted because the candidates could simply make their views known outside the convention and watch (even if not encourage) supporters carry the message to the party faithful. In the same manner, the canon barring party identification would no longer matter because, even if the candidate does not declare himself a Republican or Democrat, the public would know or presume his affiliation from the literature and efforts of the party endorsing him. Thus, the Announce clause is a critical thread in the fabric of non-partisan judicial elections in which Minnesota has expressed a compelling interest for nearly 150 years.

c. That Minnesota has opted to elect its judges does not defeat or diminish the State's compelling interests in actual and apparent judicial impartiality and non-partisan elections. To say that Minnesota has chosen to elect its judges simply begs the question of what **type** of judicial election system did the State choose? Only if Minnesota, in choosing an election system, explicitly or implicitly chose

one that no longer valued actual and apparent judicial impartiality and non-partisan judges could it be argued that the Announce clause's limitation on judicial campaign speech does not advance a compelling state interest. However, Minnesota history (not fully recounted by the Eighth Circuit dissent or Petitioners) demonstrates just the opposite. Minnesota, to be sure, chose to elect its judges, but it simultaneously chose a non-partisan election system that was initially designed and has been repeatedly refined to protect the impartiality and the appearance of impartiality of this State's judiciary.

2. The Announce clause not only advances but advances in a narrowly tailored way Minnesota's compelling state interests.

a. The Announce clause is not overly broad. Far from a "blanket rule" against campaigning or campaign speech, the Announce clause permits judicial candidates to discuss:

- their character, fitness, integrity, education, legal experience, work habits, and ability to find facts and apply the law with impartiality—and with the appearance of impartiality. *See* Minn. Stat. § 480B.01.
- how they would handle administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979).
- past appellate court decisions. *See* Minn. Bd. on Jud. Standards, Informal Op. 10/10/90.
- their judicial philosophy or general discussions of case law. *See Kelly*, 247 F.3d at 882.

- their views on a wide-ranging list of topics compiled by the Minnesota Board on Judicial Standards. *See* pp. 22-23 *infra*.

Thus, the only two personal harms that Petitioner Wersal claims—that he cannot express his judicial philosophy and criticize past Minnesota Supreme Court decisions—are groundless. Both are permitted under known interpretations of the Announce clause.

Similarly groundless are the theoretical harms claimed by Petitioners and their *amici;* namely, that the Announce clause unfairly favors incumbents who can express their philosophy and views in court opinions, which challengers cannot criticize, and/or that incumbents cannot defend their opinions. By BOJS opinion rendered some six years before Petitioner Wersal's first campaign, it has been clear in Minnesota that the Announce clause does not preclude discussion of past appellate court opinions.

Finally, to the extent that Petitioners or their *amici* muster specific examples of the "general views on disputed legal or political issues" that should be open to candidate discussion, virtually all the subjects appear on the BOJS list of topics that candidates may discuss. *Compare* pp. 22-23 *infra* (BOJS-approved list of topics) *with* ACLU Brief at pp. 17-18 and State Supreme Court Justices Brief at pp. 29-30 (listing topics that judicial candidates should be free to discuss).

b. Just as it is not overly broad, the Announce clause is not unconstitutionally vague. As construed by the Eighth Circuit and affirmed by the Minnesota Supreme Court, the Announce clause's limitation on campaign speech extends only to "issues likely to come before the court." To insist on a more precise definition—because possibly any issue could

come before a court—is to insist on more linguistic specificity than required of any other standard limiting First Amendment speech. (For example, terms such as "average person," "community standards," "prurient interest," and "social value"—which this Court uses to determine obscene material—are no more definite than "issues likely to come before the court.") That terms and definitions are situation-dependent does not make them unconstitutionally vague under the First Amendment.

Moreover, permitting judicial candidates to express their "general views on disputed legal and political issues" would be equally, if not more, vague. (What is a "general view"? When is a view not "general," or no longer general enough? When is a view not "legal" or "political"? When is it not "disputed"?) Indeed, this standard would likely require the same type of case-by-case interpretation and enforcement to which Petitioners object.

c. Finally, none of the "less restrictive means" proffered by Petitioners or their *amici* would satisfy Minnesota's compelling interests fully, practically, and effectively.

(1) Barring only "pledges or promises" would do nothing to preserve the **appearance** of impartiality of a candidate who, although making no pledges or promises, expressed views leaving little doubt about how he would rule. For example, it would require little imagination or creativity for a candidate to preface his view on any issue likely to come before the court with the disclaimer, "Although I cannot promise anything about how I would rule...." Following that type of disclaimer, the candidate could proffer very specific views raising the appearance of partiality. Only the Announce clause, by preventing end-runs on the "pledges or promises" clause also found in Minnesota's Canon 5, fully,

practically, and effectively satisfies the State's compelling interest in preserving the impartiality and appearance of impartiality of state judges.

(2) Nor does recusal offer an alternate means for fully ensuring judicial impartiality or the appearance of impartiality because recusal works only if a judge voluntarily steps aside. Moreover, recusal is a more difficult choice for a judge knowing that voters agreeing with his "general views on disputed legal or political issues" might not re-elect him for failing to rule on a case in which he could deliver on his campaign-expressed views.

(3) Nor does affording litigants the right to strike a judge without cause, *see* Minn. R. Civ. P. 63.03, fully satisfy the State interest in actual and apparent impartiality. The rule affords each party only one strike, potentially leaving a litigant at the mercy of a reassigned judge who may also have expressed campaign views on the matter at issue. In addition, the rule requires removal of a judge within 10 days of the judge's assignment, leaving no recourse if the judge first expresses views during a campaign that occurs mid-way through the litigation. Moreover, in rural areas where few (and sometimes only one) judges serve in Minnesota, striking a judge is very difficult for a lawyer who must appear regularly before that judge on dozens of other matters. Further, striking the sole judge in a Minnesota county places undue burden on other counties whose judges must hear the matter.

(4) Likewise, the right of appeal—even to a multi-judge panel—does not satisfy Minnesota's compelling interests fully, practically, or effectively. So much of what a trial judge does cannot be readily challenged on appeal. Before entry of final judgment in Minnesota, trial court rulings generally are not subject to appellate review. Even after final judgment, many rulings can be reviewed only for

abuse of discretion, and findings of fact can be reversed only if clearly erroneous. As a practical matter, these standards of review make it impossible to remedy rulings influenced—or apparently influenced—by campaign-expressed views. Moreover, if the partiality or appearance thereof arises in the court of appeals, review in the Minnesota Supreme Court would be entirely discretionary. Similarly, review by this Court would be entirely discretionary if the partiality or appearance of partiality arose due to the campaign speech of Minnesota Supreme Court justices.

(5) Ironically, a life tenure or appointment/merit selection system would afford Petitioner Wersal far less freedom of judicial campaign speech because, in a life-tenured or appointed judiciary, there would be no judicial campaigns and therefore no judicial campaign speech at all. Even if less restrictive, however, life-tenure or appointment systems would not be an "available" means to satisfy a state's compelling interests in a state that chooses to elect judges. Finally, there is no constitutional basis for requiring a state to forego an elected judiciary, in favor of a life tenure or appointment-based system, in order to preserve its compelling interest in actual and apparent judicial impartiality.

ARGUMENT

I. The Announce Clause, as Construed by the Eighth Circuit, Advances Minnesota's Compelling Interests in Both the Impartiality and the Appearance of Impartiality of a Non-Partisan Judiciary.

A. The impartiality and appearance of impartiality of a non-partisan judiciary are compelling Minnesota interests.

Preserving the independence of its judiciary is one of the highest purposes to which any government can aspire.

"[T]he law commands allegiance only if it commands respect. It commands respects only if the public thinks the judges are neutral." Bill Moyers, *Strong Warnings from the Supreme Court*, U.S. News & World Report, Nov. 29, 1999, at 36 (quoting Justice Anthony Kennedy). The clash of political interests, "[i]s fine for a legislature. But if you have that in the court system, you will then destroy confidence that judges are deciding things on the merits." *Id.* (quoting Justice Stephen Breyer).

Accordingly, the Eighth Circuit found that Minnesota has "undeniably compelling" interests "of the highest order" in preserving both the impartiality and the appearance of impartiality of its judiciary. *Kelly,* 247 F.3d at 864, 876.

Even in dissent, Judge Beam agreed. *Kelly*, 247 F.3d at 891. (Beam, J., dissenting) ("I agree that a state has an interest not only in warding off an actual breakdown of that [judicial] independence, but also the appearance of such."); *id.* at 903 ("The Minnesota Supreme Court has every right to . . . protect its judiciary against both actual and the appearance of partiality.").

So do Petitioners at last.[4] *See* RPM Brief at 2 ("There is no doubt that the State [of Minnesota] has a compelling interest in assuring judicial impartiality . . . . In addition, it is legitimate for the State to regulate judicial campaign conduct and speech in various ways to ensure that they are conducted in a way that will not undermine the public perception of judicial impartiality."); Wersal Brief at 15 (adopting RPM Brief by cross-reference).

B. That Minnesota chooses to elect its judges does not defeat or diminish the State's compelling interest in the actual and apparent impartiality of non-partisan judges.

Implicit, if not explicit, in the argument of every party or *amici* objecting to the Announce clause is the assumption that Minnesota's interest in the actual and apparent impartiality of its judiciary, although compelling, is somehow less compelling because Minnesota has chosen to elect its judges. That assumption is unfounded.

The fact that a state opts to elect its judges does not mean that it has opted to sacrifice any part of its interest in judicial impartiality. *See Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3rd Cir. 1992) ("The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly.").

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[4] According to the Eighth Circuit opinion, Petitioners argued below that "Minnesota has no interest in the independence of its judiciary because it has chosen to make its judges stand for election." *Kelly*, 247 F.3d at 865. Before this Court, however, Petitioners concede that Minnesota has compelling interests in both the actual and apparent impartiality of its judiciary. *See* RPM Brief at 2.

Even though elected, judges remain different from legislative and executive officers in ways that continue to entitle states to limit their speech. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000) ("[T]he difference between judges and other government officials bear on the strength of the state's interest in restricting political speech."), *cert. denied*, 121 S. Ct. 77 (2000).

Accordingly, in evaluating whether the Announce clause embodies a compelling Minnesota interest, the question is not whether the State has chosen to elect its judges but instead what type of election system did it choose. Did Minnesota choose a judicial election system with all the campaign trappings of legislative and executive races? Or did it instead choose a system designed to insure that judges, although elected, remain non-partisan and maintain their impartiality and appearance of impartiality during the campaign?

The answer is clear. For nearly 150 years, Minnesota has sought to distinguish judicial from legislative and executive elections in ways that serve to protect its judiciary from partisan politics and to preserve both the impartiality and the appearance of impartiality of its elected judges.

In 1857, the original framers of the Minnesota Constitution established seven-year judicial terms so that judicial elections did not coincide with the elections for partisan offices. *See* Minn. Const. art. 6, § 3 (1857). At the same time, the framers required judges to be "learned in the law," implicitly subjecting judges to more "restrictive canons

of conduct governing the profession of law." *See Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992) (interpreting Minn. Const. art. 6, § 5 (1857)). In 1883, judicial term length was reduced to six years, presenting "difficulties associated with partisan judicial elections." *Id.* at 420. Thus in 1912, the Minnesota Legislature met in special session to pass legislation mandating non-partisan judicial elections. *See* Act of June 19, 1912, ch. 2, 1912 Minn. Laws, Spec. Sess. 4-6. In 1949, the Legislature reiterated that "[e]ach associate justice or judge is deemed to hold a separate non-partisan office." *See* Minn. Stat. § 205.82 (1950). In 1974, the Minnesota Supreme Court first adopted a code of judicial ethics designed, again, to assure non-partisan elections and to preclude political activities, except on measures to improve the law or legal system. *See* Minn. Code of Judicial Ethics (1974). In the 1980s, Governors Albert Quie (1979-1983) and Rudy Perpich (1983-1990) formed judicial selection committees to help screen candidates for gubernatorial appointment to judicial vacancies. In 1990, the Legislature recognized the wisdom of this system by permanently establishing a non-partisan Judicial Merit Selection Commission for recommending judges based not on their partisanship but on their "integrity, maturity, health if job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service." *See* Minn. Stat. § 480B.01, subd. 8.

In light of this history, it should come as no surprise that the Minnesota Supreme Court would conclude, "[w]hile the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary." *Peterson*, 490 N.W.2d at 420.

In dissent, Judge Beam also recounts Minnesota history to conclude that Minnesota "opted for an elected judiciary" in 1857 and "has never since intimated a change in this policy." *Kelly*, 247 F.3d at 889. That history and conclusion is accurate—but only so far as it goes. It does not answer the ultimate question; namely, "Did Minnesota, in initially and continually opting for an elected judiciary, ever opt for a **type** of judicial election system that might compromise either the impartiality and or the appearance of impartiality of its judges?" The answer to that question is unequivocally, "No."

That is why opponents of the Announce clause cannot simply assume, as they do, that Minnesota, by opting to elect its judges, also opted for an election process that would permit judicial candidates to express the same type of campaign speech as legislative or executive candidates. Neither the law nor Minnesota history, fully recounted, supports that assumption.

Nor do they support the corollary assumption, argued under the rubric of "accountability," that Minnesota chose to make judges accountable to the voters in the same manner as legislative and executive officeholders. The term "accountable" merely begs the question, "Accountable for what?" In answer to that question, Minnesota's history again demonstrates that the State never envisioned or embraced a type of "accountability" in which judicial candidates, like legislative and executive candidates, would express their views on issues likely to come before them if elected. Instead, Minnesota adopted a system in which voters could learn—and thus make judicial candidates accountable for—their qualifications, their handling of administrative duties, their views on past appellate court decisions, their judicial philosophy, and their views on a wide-ranging list of topics approved by the Board on Judicial Standards. *See* pp.

22-23 *infra* (listing matters that candidates may freely discuss with voters).

Thus, notwithstanding the State's decision to elect its judges or make them accountable to voters, Minnesota has always retained an undeniable—and undiminished—interest in both the impartiality and the appearance of impartiality of a non-partisan judiciary.

C. The Announce clause serves Minnesota's compelling interests.

1. The Announce clause preserves both the impartiality and the appearance of impartiality of Minnesota's judiciary.

The Eighth Circuit reasoned—and the MSBA fully concurs—that a "judge is placed in an awkward, if not impossible, position" when it comes time to rule on issues which were likely to come before the court but on which he nevertheless expresses his views during the campaign. *See Kelly*, 247 F.3d at 878. If the judge rules consistently with his campaign-expressed views, it may well appear that he prejudged the merits. However, if he rules inconsistently with his campaign-expressed views, then he need fear that the voters may replace him with a candidate who will rule consistently with his campaign-stated views. Either way, at least the appearance of impartiality is compromised.

That judges take oaths does not eliminate this specter of partiality for two reasons.

First, even if campaign-expressed views do not subtract from a judge's actual impartiality, they subtract from his *appearance* of impartiality, which is "an equally important

interest in preserving public confidence in [judicial] independence and impartiality." *See Kelly*, 247 F.3d at 867. There is a reason that Minnesotans feel so much more trust and confidence in the judicial than in the legislative and executive branches of government. (For example, a 1999 survey conducted by an independent market research firm found that 79% felt "trust" in the Minnesota court system, 78% expressed "confidence" in it, 77% thought the courts treated people with "respect," and 84% believed the Minnesota courts "protect people's constitutional rights." 1999-2000 Minnesota Supreme Court Public Opinion of the Courts Study.) The reason is that few Minnesotans see district and appellate court judges acting like politicians. Allowing "general views on disputed legal or political issues" into judicial campaigns would only make judges sound like politicians and undermine public confidence in the impartiality and of its judiciary.

Second, even an oath-conscious judge would be hard-pressed to know at times that he ruled exactly as he would have ruled had he not expressed some view on the issue during his campaign. Given the hundred different ways that a judge can his exercise his discretion, it is impossible for a judge to know that, but for a campaign-expressed view, he exercised his discretion in the same way as if he had announced no views at all. In this respect, Petitioners cannot have it both ways. They cannot, on the one hand, tell a candidate that they need to know how he will exercise his discretion in order to endorse or support him, but on the other hand believe that he will only exercise his discretion impartially. Similarly, they cannot demand to know how a candidate will exercise his discretion in order to make him "accountable" to the public, yet expect the public to believe that he did act impartially when he exercises his discretion exactly as he stated he would during his campaign.

2. The Announce clause also preserves Minnesota's interest in non-partisan elections and other judicial canons.

Although not part of the Eighth Circuit's analysis, the Announce clause is also critical to the future of another compelling state interest—keeping judicial elections non-partisan and other judicial canons viable.

According to Petitioner Wersal, the Republican Party declined to endorse him in 1998 solely because its "delegates could not intelligently evaluate endorsing [his] judicial candidacy without knowing [his] general views on disputed political or legal issues." *See* Wersal Brief at 8.

So what happens to non-partisan elections and other judicial canons if the Announce clause no longer stands in the way of judicial candidates expressing their "general views on disputed political or legal issues"? They would be effectively gutted.

- Attending or speaking at political gatherings—barred by Canon 5(A)(1)(d)—would become meaningless because the candidate could pronounce his "general views on disputed legal or political issues" outside political conventions or gatherings and count on his supporters to carry those views to political groups.
- Party identification, barred by Canon 5(A)(1)(a), would become unimportant to the candidate, for he could now safely assume without saying he is a Republican or Democrat that the public will think he is a Republican or Democrat if endorsed by that party.

- Party endorsement, barred by Canon 5(A)(1)(d), would be far more likely, as Petitioner Wersal concedes, because party conventions would know the judicial candidate's views even if the candidate, technically, could not seek or accept endorsement.

Thus, the Announce clause does far more for Minnesota than foster the impartiality and appearance of impartiality of the judiciary. It also forms a critical thread in the fabric of Judicial Code provisions that keep judicial elections non-partisan in this State. Indeed, it is not too much to say that the entire fabric of Minnesota's non-partisan elections hangs by the Announce clause thread.

II. The Announce Clause, as Construed by the Eighth Circuit, is Narrowly Tailored to Serve Minnesota's Compelling Interests in the Impartiality and the Appearance of Impartiality of Its Non-Partisan Judiciary.

A. The Announce claus is not unconstitutionally overbroad.

Far from a "blanket rule" against campaign speech that makes "silence" the only proper course for a judicial candidate, the Announce clause permits discussion of a wide array of subjects.

1. First, of course, the Announce clause does not preclude judicial candidates from campaigning on their **character, fitness, integrity, education, legal experience, work habits, community service, and ability**. *See* Minn. Stat. § 480B.01.

2. In addition, the Announce clause does not preclude candidates from explaining how they would handle

administrative duties if elected. *See Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979).

3. Further, the Announce clause does not preclude candidates from expressing their views on **past appellate court decisions**. *See* Minn. Bd. on Jud. Standards, Informal Op. 10/10/90; *accord, Kelly*, 247 F.3d at 882.

This fact is particularly important for two reasons. First, Petitioner Wersal claimed below—as one of just two specific, personal harms that the Announce clause inflicted on his 1996 campaign—that he was unable to criticize two Minnesota Supreme Court decisions. *See* Wersal's Brief at 6-7. That claim is—and even then was—groundless; some six years earlier in 1990, the Board on Judicial Standards ("BOJS") had approved candidate discussion of past appellate court decisions. Second, the fact that candidates can discuss past decisions dispels the notion (of Petitioners and their *amici*) that challengers cannot criticize and incumbents cannot defend past appellate court decisions. Similarly, it dispels the corollary notion that incumbents enjoy an unfair advantage over challengers because they can express their legal views in court opinions that challengers cannot criticize.

4. Nor does the Announce clause preclude candidates from stating their **judicial philosophy**. *See Kelly*, 247 F.3d at 882-83 (Eighth Circuit prediction that the Minnesota Supreme Court would conclude that discussions of "a candidate's judicial philosophy do not fall within the scope of the Announce clause"); *accord, In re the Code of Judicial Conduct*, No. C4-85-697 (Minn. S. Ct. Jan. 29, 2002) at 1 (ordering enforcement of the Announce clause as interpreted by the Eighth Circuit).

Again, this fact is critical for two reasons. First, it renders moot the second of the personal harms claimed by

Petitioner Wersal; namely, that he cannot discuss his judicial philosophy. He can. Second, it also renders moot the primary philosophical objection to the Announce clause; namely, that because judges make law by creating and developing the common law and by exercising discretion, a voter should be able to know a candidate's judicial philosophy. *See* RPM Brief at 2. A voter can know—and a candidate can express his—judicial philosophy without violating the Announce clause.

5. Finally, the Announce clause does not preclude candidate discussion of a wide-ranging list of topics. During the 1996 elections, for example, candidates could offer their views on:

- "the most critical issue currently facing the Hennepin County Criminal Justice System";
- the "public disclosure of disciplinary actions" against judges;
- the use of "cameras in the courtroom";
- "the root cause for the high number of juvenile offenders";
- "the length of time it takes to get . . . cases to trial";
- the best ways to spend $50 million "to address the issues of crime and violence";
- the "problem of domestic abuse" and how "to lower the number of domestic assault cases that are being dismissed" before trial;
- the "mission" and "role" of the judge and how to accomplish it;
- the remedies for racial and gender bias;
- the ways to "balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile [offenders]";

- the practice of allowing friends and family of criminal defendants to speak at sentencing;
- the balance between "free speech rights [and] the need to control [hate crimes]";
- the criteria for deciding whether to depart from sentencing guidelines;
- the causes for high rates of minority incarceration;
- the offenses that courts should treat as "victimless crimes";
- the remedies for "underrepresentation of women or people of color in the court system";
- "the current system for disciplining lawyers and judges";
- the role of judges "in bringing important legal or judicial issues before the public or the legislature"; and
- the reasons that voters should "support you rather than your opponent".

MSBA Judicial Elections Task Force Report, Appendix C.

Interestingly, many of these subjects, along with past appellate decisions and judicial philosophy, do not substantially differ from the specific examples of speech that Petitioners and their *amici* say that the Announce clause does not—but, in fact, does—permit. *E.g.*, State Supreme Court Justices Brief at 29 ("the weight, or lack thereof, given to victims' interests in sentencing"); *id.* at 30 ("their jurisprudence and the approach they will take to the role of jurist when interpreting laws created by others as well as in potentially creating common-law rules of their own"); *id.* at 30 ("past cases that are no longer pending").

Thus, all that falls within the ambit of the Announce clause after more than 25 years of BOJS, statutory, and court guidance—and just plain common sense—is the expression of views on issues likely to come before the candidate, if elected. So tailored, the Announce clause is not overly broad.

B. The Announce clause is not unconstitutionally vague.

Even if not overly broad, Petitioners claim that the limitation of campaign speech on "issues likely to come before the court" is vague because possibly any issue could come before a court. In making that claim, however, Petitioners ask this Court to require a level of linguistic precision upon which it does not insist in limiting other forms of speech.

Obscenity determinations, for example, turn on whether "the average person, applying contemporary community standards" would find that "the work, taken as a whole, appeals to the prurient interest." *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615 (1973). Even then, the fact-finder must decide whether a reasonable person would conclude that the entire work has serious literary, artistic, political, or scientific value. *Pope v. Illinois*, 481 U.S. 497, 502, 107 S.Ct. 1918, 1921 (1987). Surely, a test that turns on who or what is the "average person," the "community standard," a "prurient interest," a "reasonable person," or literary or artistic value is no less vague than one that turns on what "issues will likely come before the court." Situation-dependent terms do not make a standard inherently vague under the First Amendment.

Indeed, lawyers (and under Minnesota law, all judicial candidates are lawyers) often do situational analyses, *i.e.*, applying legal standards to facts, before advising their clients

to undertake or not undertake a particular action. If they can do it for their clients, they can reasonably do it for themselves.

Moreover, Petitioners' proposal—permitting candidates to express their "general legal views" or their "general views on disputed legal or political issues"—is no less vague than they claim the Announce clause is. What is a "general view"? When is it no longer general or general enough? These questions and others would require the same type of case-by-case determinations that the Announce clause does.[5]

C. The Announce clause is the least restrictive means available to achieve Minnesota's compelling interests fully, practically, and effectively.

Curiously, within all the pages criticizing the Announce clause as not the least restrictive means possible, Petitioners identify very few other means for Minnesota to satisfy its compelling interests. Petitioner Wersal offers none. Petitioner RPM proposes only a few. *See* RPM Brief at 17-18, 37-39. None serve Minnesota's compelling interests as fully, practically, or effectively as the Announce clause.

1. Barring only "pledges or promises" would do nothing to preserve the **appearance** of impartiality of a candidate who, although making no pledges or promises,

[5] The *amici* supporting Petitioners also lack a more clearly defined test for protected campaign speech. Especially curious is the ACLU position. After arguing that the phase "likely to come before the court" is unconstitutionally vague, the ACLU states that a constitutionally acceptable provision "must be limited to speech by judicial candidates that expressly commits them to a particular result in a particular case likely to come before them." *See* ACLU Brief at 3-4. That the ACLU standard also includes a "likely to come before [the court]" clause suggests that the language is not, per se, unconstitutionally vague.

proceeded to express views that left little doubt about how he would rule. A candidate need only incorporate some "magic phrases" at the beginning of every expressed view to avoid making a pledge or promise. For example, even an unimaginative candidate could find a way to say, "Although I cannot promise anything about how I would rule on a law banning state funding of abortion clinics, I believe 'X' about legislative efforts to restrict abortion funding." Nor would it take much creativity for a candidate to say, "I would need to see all the facts in the case before making a decision on a gun control statute, but my general legal view on gun control regulations is 'Y'". Only the Announce clause forecloses this type of end-run and fully, practically, and effectively satisfies Minnesota's compelling interest in preserving the impartiality and the appearance of impartiality of its judiciary.

2. Nor would recusal fully or effectively avoid either actual or apparent judicial partiality. Recusal will prevent partiality and the appearance of impartiality only if the judge voluntarily steps aside. In addition, as Petitioners argue, a judge need only disqualify himself "if there is a bias concerning a party, as distinguished from bias concerning an issue in the case." *See* RPM Brief at 19 (citation omitted). Thus, the law of recusal would not even require a judge to step aside if his bias involved an *issue* on which he expressed campaign views. Moreover, a judge who chooses to recuse himself on a matter on which he had expressed campaign views would risk angering his supporters—in a manner that Petitioners would hold him "accountable"—for failing to "deliver" on his campaign-expressed views. Finally, it hardly serves a state's compelling interest in judicial administration to elect judges who must—or feel it better—to disqualify themselves because they expressed campaign views on issues likely to come before the court.

3. Similarly, affording litigants the right to strike a judge without cause, *see* Minn. R. Civ. P. 63.03, does not fully or effectively satisfy Minnesota's interests in actual and apparent impartiality. The rule affords only one strike, potentially leaving a litigant at the mercy of another judge who may also have expressed campaign views on the matter at issue. The rule requires removal of the judge within 10 days of the judge's assignment, leaving no recourse if the judge first expresses views during a campaign that occurs mid-way through the litigation. Moreover, in Minnesota's rural counties where few (and sometimes only one) judges serve, striking a judge is very difficult for a lawyer who, after all, must appear regularly before that judge. For instance, in over 20 Minnesota counties, there are no more than three judges who serve the county, and oftentimes only one judge actually has chambers in the county. In these counties, removing the judge may irreparably harm the lawyer's relationship with the local judiciary. Further, striking the sole judge in a Minnesota county places undue burden on other counties whose judges must hear the matter.

4. Likewise, the right of appeal—even to a multi-judge panel—does not satisfy Minnesota's compelling interests fully, practically, or effectively. So much of what a trial judge does—whether actually or apparently influenced by views expressed during a campaign—cannot be fixed on appeal. Prior to final judgment in Minnesota, trial court rulings generally are not subject to appellate review. Even after final judgment, many rulings can be reviewed only for abuse of discretion, and findings of fact can be reversed only if clearly erroneous. Moreover, if the partiality or appearance of partiality arises in the court of appeals, further review in the Minnesota Supreme Court would be entirely discretionary. Similarly, review by this Court would be entirely discretionary if the partiality or appearance of

partiality first manifested itself because of the campaign speech of Minnesota Supreme Court justices.

5. Finally, Petitioners argue that a judicial system based on life tenure is somehow less restrictive of free speech rights than the Announce clause. *See* RPM Brief at 38. Ironically, however, a life tenure or appointment/merit selection system would afford candidates like Petitioner Wersal far less freedom of judicial campaign speech because, in a life-tenured or appointed judiciary, there would be no judicial campaigns at all. While the life tenure system might have its merits, Petitioners cannot seriously argue that a system in which there are no judicial campaigns allows more campaign speech. Moreover, even if life-tenured or appointment systems were a less restrictive means, they would not be an "available" means to satisfy the compelling interests of a state that chooses to elect judges. Nor is there any constitutional basis for requiring a state to forego an elected judiciary in order to pursue its compelling interests in the impartiality and the appearance of impartiality of its judiciary.

All in all, none of the other suggested means preserve Minnesota's compelling interests as fully, practically, and effectively as the Announce clause, working in conjunction with the "pledges or promises" clause of Canon 5. Scrutiny of First Amendment speech limitations, although strict, does not constitutionally require a state to settle for a means that will satisfy only some of its compelling interests just some of the time. Nor does it require a state to settle for a means that will satisfy all its compelling interests but only under some circumstances. Minnesota is entitled to a means that fully, practically, and effectively serves its interest in the impartiality and the appearance of impartiality of its non-partisan judiciary. The Announce clause, operating in tandem with the "pledges or promises" clause of Canon 5, is that means.

CONCLUSION

A former Republican governor, Arne H. Carlson, once wrote that if the federal courts strike down the Announce clause, then "[c]andidates for a judgeship could proclaim their disdain or support for any group, partisan position, policy or principle, leaving future litigants with little doubt as to the outcome of their case." That result would subvert the "Founding Fathers [vision of] a judiciary well above the fray of partisan politics, independent from the whims of special interests and the influence of powerful people." It would destroy the public perception of "judges who focused only on the law and facts before them" and who "could be trusted to peacefully resolve the myriad conflicts of humanity and government." Arne H. Carlson, *Justice Should Never Have a Party Label*, Minneapolis Star Trib., Jan. 17, 2002, at A18.

The Minnesota State Bar Association finds both wisdom and common sense in these words and, accordingly, urges the Court to affirm the Eighth Circuit's holding that the Announce clause, as construed by the Eighth Circuit and now adopted by the Minnesota Supreme Court, is constitutional.

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